

File



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Samuel Bonanno for a Permit to
Construct a Pier and Pier Crib on the Bed of Lake
Geneva, Town of Linn, Walworth County,
Wisconsin

Case No. 3-SE-98-0002

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Samuel and Marilyn Bonanno applied to the Department of Natural Resources (Department) for a permit to place a pier on the bed of Lake Geneva. The Department issued a Notice of Proposed Pier which stated that unless written objection was made within thirty days of publication of the notice, the Department might issue a decision on the application for a permit without a hearing. The Department received several timely objections. On April 13, 1998, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice, a hearing was held in Lake Geneva, Wisconsin on May 21, 1998, before Mark J. Kaiser, Administrative Law Judge. Attorney Peter B. King, on behalf of Lewis Borsellino, filed written argument on June 1, 1998. Attorney John A. Rothstein, on behalf of Ralph and Eileen Rothstein, filed a rebuttal on June 3, 1998.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Samuel and Marilyn Bonanno, Applicants, by

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Ralph and Eileen Rothstein, Intervenor, by

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411 East Wisconsin Avenue
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Lewis Borsellino and Lake Geneva Conservancy, Inc., Objectors, by

Peter B. King, Attorney
157 Third Avenue
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2911 Oak Brook Hills Road
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Wisconsin Department of Natural Resources, by

Michael Lutz, Attorney
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APPLICABLE LAW

Section 30.13(1), Stats., provides:

A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

- (a) The wharf or pier does not interfere with public rights in navigable waters.
- (b) The wharf or pier does not interfere with rights of other riparian proprietors.
- (c) The wharf or pier does not extend beyond any pierhead line which is established under sub. (3).
- (d) The wharf or pier does not violate any ordinances enacted under sub. (2).
- (e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

Sections 30.12(2), Stats., provide in relevant part:

The department, upon application and after proceeding in accordance with s. 30.02 (3) and (4), may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation . . . and is not detrimental to the public interest.

FINDINGS OF FACT

1. Paul and Catherine Wurtz owned property along the northwest shore of Lake Geneva. In 1966, the Wurtzes subdivided their property and recorded a certified survey map delineating three lots. The three lots are currently owned by Lewis Borsellino (Lot A), Samuel and Marilyn Bonanno (Lot B) and Ralph and Eileen Rothstein (Lot C). On its southern border, Lot A fronts on Lake Geneva. Lot B is directly upland from Lot A. Lot C is also upland from Lot A and directly east of Lot B.

2. Samuel and Marilyn Bonanno also own a twelve foot wide strip of land that abuts Lake Geneva (the access lot). The legal description of the access lot is the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 4, Township 1 North, Range 17 East, Town of Linn, Walworth County, Wisconsin. Lake Geneva is navigable in fact at the project site. At the time the Wurtz property was subdivided, the access lot provided a means for Lots B and C to access the lake. For twenty-eight years, the owners of Lots B and C placed a shared pier in the lake adjacent to the access lot. A pier agreement entered into in 1968 by the then owners of Lots B and C, Wurtz and Thomas Moorhead, documents the shared nature of the pier.

3. The pier located adjacent to the access lot remained essentially unchanged until 1997. In August, 1996, Lewis Borsellino filed a complaint pursuant to sec. 30.14, Stats., alleging that the pier was being maintained in violation of secs. 30.12 and 30.13, Stats. After a contested case hearing (Case No. 3-SE-92-376) the pier was found to exist in violation of secs. 30.12 and 30.13, Stats., primarily because it exceeded the reasonable use of public waters and was located in Mr. Borsellino's riparian zone. An application for an after-the-fact permit for the existing pier was denied.

4. The Bonannos removed the pier which was the subject of Case No. 3-SE-92-376. By application dated December 16, 1997, and received by the Department on January 2, 1998, Samuel and Marilyn Bonanno (applicants) applied for a permit to construct another pier on the bed of Lake Geneva adjacent to the access lot. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

5. The proposed pier is 96 feet long and six feet wide except for a section located from 48 feet to 72 feet from the shore. At this section the width of the pier is reduced to three feet and an approximately 8 $\frac{1}{2}$ foot wide boat lift is attached to the pier. The proposed pier and attached boat slip are designed to fit within the Bonannos' riparian

zone. The proposed pier includes two rock filled cribs. One crib is located at the lakeward end of the pier and the other crib is located approximately 72 feet from the shoreline. The water depth at the lakeward end of the proposed pier is approximately seven feet.

6. The shoreline in the area of the proposed pier is highly developed. A concrete seawall has been constructed along the shore. The vegetation above the ordinary high water mark consists of manicured lawn, low shrubs and perennial flowers. The vegetation below the ordinary high water mark consists of sago pondweed and narrow-leafed pondweed.

7. The area where the pier is proposed to be located is used by a variety of fish species for spawning and nursery habitat and on a transient basis by waterfowl. The Department is not concerned about any negative impacts on fish or wildlife habitat resulting from the construction of the proposed pier because the lakebed in this area drops rapidly. Boating in this area is not done in the littoral zone, which is the critical fish and wildlife habitat.

8. The riparians on both sides of the access lot, Lewis Borsellino and John and Susan Ciciora, object to the proposed pier. They object because they fear placement of a pier and boatlift adjacent to a lot with only twelve feet of frontage will result in a dangerous level of congestion in this area. They argue placement of a pier at this location will interfere with their riparian rights. Upon compliance with the conditions in the permit, the proposed pier will not interfere with public rights or unreasonably interfere with the rights of other riparians.

9. The Town of Linn has an ordinance requiring a minimum setback of 12.5 feet from a property owner's riparian zone line. The Town of Linn also recognizes the extended lot line as the appropriate method for determining riparian zones.

10. The Town of Linn has established a pierhead line for this area of Lake Geneva. The pierhead line is 125 feet from the shoreline. The proposed pier does not extend beyond the pierhead line.

11. The proposed structure will not reduce the effective flood flow capacity of Lake Geneva upon compliance with the conditions in the permit.

12. The proposed structure will not adversely affect water quality nor will it increase water pollution in Lake Geneva. The structure will not cause environmental pollution as defined in sec. 299.01(3), Stats., if the structure is built and maintained in accordance with this permit.

13. Upon compliance with the conditions of the permit, the proposed pier will not result in significant cumulative impacts.

14. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Adm. Code, regarding assessment of environmental impact.

Discussion

In general, statutory and common law provide that a person who owns property abutting a natural body of water has certain riparian rights. For example, In State v. Bleck, 114 Wis.2d 454, 338 N.W.2d 492 (1983), the Wisconsin Supreme Court stated:

Although the public trust doctrine safeguards interests of all members of the public in navigable waters, Wisconsin has also recognized the existence of certain common law rights that are incidents of riparian ownership of property adjacent to a body of water. [citations omitted] Such riparian rights include the use of the shoreline of the riparian owner's property, the reasonable use of the water, and the privilege to use a lake for bathing, swimming and boating. [citations omitted] A riparian who owns property abutting navigable lakes has been held to have a right of access to and from the lake upon his land, a right to build wharves and piers in aid of navigation, and a right to have water flow to his land without artificial obstruction. [citations omitted]

114 Wis.2d 454, at 466.

Sec. 30.13(1), Stats., expressly allows a riparian owner to maintain a pier. However, this right is limited to the reasonable use of the resource. Sterlingworth Condominium Ass'n v. DNR, 205 Wis.2d 710, at 731, 556 N.W.2d 791 (Ct.App. 1996). The issue is what constitutes reasonable use. The Department has attempted to define "reasonable use" in guidelines set forth in a memorandum dated December 19, 1991 (exh. 11). The Department's guidelines with respect to boat slip density allow two slips for the first fifty feet or less of frontage. The applicant has twelve feet of frontage, thus the Department's guidelines would allow slips for two boats on the applicant's frontage.

Although the guidelines are not law, they do provide a useful starting point for evaluating a pier application. Ultimately, however, each application must be considered on a case-by-case basis. The decision requires a balancing of riparian rights with public interest. "Both [Sec. 30.12 and 30.13, Stats.,] authorize the DNR to weigh the relevant policy factors which include "the desire to preserve the natural beauty of our navigable waters, to obtain the fullest public use of such waters, including but not limited to navigation, and to provide for the convenience of riparian owners." Sterlingworth, 205 Wis.2d 710, at 724-25.

In the instant case the concern raised is not that the proposed pier will negatively impact the public interest in Lake Geneva, but rather that it will interfere with the rights of other riparians. Based upon the size and location of the Ciciora and Borsellino piers, there is no doubt that the proposed pier will result in conflicts among the three riparians.

However, the anticipated conflicts do not appear so great as to justify denial of the Bonanno application. Upon compliance with the conditions attached to the permit, the exercise of their riparian rights by the Bonannos will not unreasonably interfere with the riparian rights of either the Cicioras or Mr. Borsellino.

The Rothsteins request that the permit provide for two boat slips on the proposed pier. As discussed, placing a pier with one boat slip adjacent to a lot with only twelve feet of frontage will result in conflicts among the three riparians. Placing two boat slips on this pier would be excessive and unreasonable. Pursuant to the pier agreement the Rothsteins are entitled to use of the access lot and pier. However, it would constitute an unreasonable use of the riparian zone adjacent to the access lot to allow two boat slips to be attached to the proposed pier. A condition of the permit is that only one boat be moored at the pier at any particular time. It will up to the Bonannos and Rothsteins to allocate use of the pier and boat slip.

Finally, The objectors argue that a permit for the proposed pier can not be granted because the pier, as proposed, will violate the Town of Linn's setback ordinance. Pursuant to sec. 30.13(4)(d), Stats., a pier which violates the regulations in an ordinance enacted under [sec. 30.13(2), Stats.] constitutes an unlawful obstruction of navigable waters. A condition of the permit is that the applicants must obtain any necessary authority needed under local zoning ordinances. It is the responsibility of the applicants to persuade the town authorities that the proposed pier complies with the local zoning ordinances or obtain a variance from the setback requirement. It is beyond the scope of this hearing to interpret the application of the Town of Linn's zoning ordinances to the proposed pier.

With respect to setbacks, the only requirement of the Department is set forth at sec. NR 326.07(3), Wis. Adm. Code. This section provides:

To provide each riparian with sufficient room to place a pier and moor a boat along the common line between adjacent riparians the following technique will be used:

(a) Each riparian shall back their respective pier away from the common line or point of intersection of that line with the line of navigation in proportion to the riparian's share of the 2 adjacent shoreline lengths until sufficient room is provided to moor each riparian's boat at their respective pier and to provide safe maneuvering room for each boat to approach or leave the respective pier.

(b) If a riparian cannot move sufficiently from one side without violating the rule on the other side, then the riparian shall position the pier in that location which best satisfies the rule on both sides and each riparian shall then move far enough to the side regardless of shoreline proportions to afford the necessary clearance.

The permit is conditioned upon compliance with sec. NR 326.07(3), Wis. Adm. Code.

The objectors also request a finding that the proposed pier is a new structure, not a replacement structure. The reason for this request is that the Town of Linn's zoning ordinances do not apply to existing or replacement piers. Although the Department's reasonable use guidelines do take historic use into consideration in determining reasonable use, the concept of a replacement pier is specific to the Town of Linn's zoning ordinance. It is also beyond the scope of this hearing to find that the proposed pier is, or is not, a replacement pier pursuant to the Town of Linn's ordinances.

CONCLUSION OF LAW

1. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
2. The proposed pier described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.
3. The proposed pier will not constitute an impairment to navigation and will not be "detrimental to the public interest in navigable waters" within the meaning of secs. 30.12(2), Stats., if it is constructed and maintained in accordance with the conditions of the following permit.
4. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
5. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30.12, Stats., for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the Department of Natural Resources for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction of the structure.

4. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.

5. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.

6. The permittee shall notify the Water Management Specialist, not less than five working days before starting construction and again not more than five days after the project has been completed.

7. Any area disturbed during construction shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.

8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Area Water Management Specialist at least five working days in advance.

9. The applicant shall not place any mooring buoys in the lake.

10. No part of the pier or shore station shall extend beyond the permittee's riparian zone. The permittee shall locate the pier in compliance with sec. NR 326.07(3), Wis. Adm. Code.

11. Only one boat shall be moored at the pier at any particular time.

12. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on July 31, 1998.

STATE OF WISCONSIN
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.